A FEDERAL CODE OF ADMINISTRATIVE PROCEDURE (ON THE MOON—THAT IS)

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The report of a visit to the Moon was discovered recently in a capsule hidden away among the law reviews in the library of a well-known American law school. Unfortunately, neither the author of the report nor the institution to which it was addressed has been ascertained. Research to that end has been instituted and it is hoped that the true facts concerning this twentieth-century literary find may soon be known. Meanwhile, authorization has been received to reveal certain portions of the report:

> Upon our arrival in the middle of the Moonjave Desert we were greeted by a reception committee of Moonmen. They were friendly and hospitable and altogether quasi-human. They escorted us to their capital city—Alcatraz—where we were put up—rather, I should say, put down in a hotel for interplanetary visitors, called Celestial House. The reason we were put down is that Alcatraz on the Moon is all underground. These Moonmen are too wise, in this age of interplanetary guided and unguided missiles, to live any longer on the surface of the ground.
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> We were very much impressed with Moon Society. For in Alcatraz on the Moon people literally do nothing except push buttons, ring bells, and pull levers. You see Alcatraz is a completely technological city. It was finished in every mechanical detail about the time Alley Oop took his first ride on Dinny. And since the metal they use is indestructible, there hasn't been a thing for them to do since then except to regulate their machines.
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> But they keep busy—because, after all, they are quasi-human. And so, of course, they have a government, and everyone spends 40 hours a week at work governing everyone else, and that keeps the people occupied and happy and creates a good deal of confusion and turmoil as well.
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> We were very much interested in their form of government, the pursuit of which had been their sole interest for so many millions of years, and we were gratified to learn that, after so much experience, its basic structure was not unlike our own.
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> They have four branches—the legislative headed by the

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† *This paper was given by Mr. Harris at the Round Table on Administrative Law at the annual meeting of the Association of American Law Schools.* [Ed.]

Congress, the executive headed by the President, the judicial headed by the Chief Justice, and a branch they call the administrative headed by the PAPAPEBAOBOG. Now PAPAPEBAOBOG is really an abbreviation. It stands for Principal Administrator Possessing All Powers Exercised By All Other Branches Of Government. We learned that 99.7 per cent of all the employees of Moon Government work in the fourth, or the administrative branch.

PAPAPEBAOBOG is a rather difficult word for Earthmen to pronounce and we were relieved to learn that the Moonmen call it PAPA for short. We asked PAPA to explain the Why's and Wherefore's of the administrative branch of Government on the Moon. He pushed a couple of buttons and rang a bell and then gave us his undivided attention.

Now the Why of this administrative branch of the Moon Government is most interesting. You would think that in a completely technical, automatic system, there would be no need for administrative agencies to perform regulatory functions. After all, in Moon Society, everything is regulated by the people who push the buttons, etc. But the Moonmen long ago asked the question—If the regulators regulate society, who is to regulate the regulators? To answer this need they established this fourth—administrative—branch of the government.

The basic legislation guiding PAPA is FAPA—you can guess what that is—the Federal Administrative Procedure Act. We were disappointed that they hadn't got around to calling it a code. But perhaps the reason they don't have a code yet is because they only have one administrative agency on the Moon, to supervise their button pushers, and don't need anything quite that comprehensive. Anyway, we examined this basic legislation and, without going into detail, this is what we learned.

They distinguish between rules and orders. That which is legislative in form, that is, would be enacted by the Congress in the absence of an administrative system, is called a rule and the process by which it is adopted is known as a rule-making. That which is judicial in form, that is, would be conducted by the judiciary in the absence of an administrative system, is called an order and the process by which it is promulgated is known as adjudication.

As to rule-making, they believe that the administrative process should generally follow the customary methods of enacting legislation. They have noted that most acts of Congress are adopted after public debate and committee hearings in which views for and against the bill are presented and considered. Of course, not everyone is interested in administrative rules, so they worked out a plan by which, before rules are adopted by the agency, reasonable notice of the proposal to do so is published in the Moonbook. This Moonbook might be described as a short-form *Federal Register* since instead of pub-

lishing everything at length in it, they give accurate summations of what is proposed, together with notice of the time and place where interested persons can present their views. The agency is required to consider fully all submissions and, except as to rules of procedure, to issue, when requested by an interested person, a concise statement of the matters considered in adopting or rejecting the rule and the reasons therefor. After one of these rules is promulgated, it has the force and effect of law. Of course, it can be challenged in the courts as contrary to the constitution, or in excess of statutory authority, or enacted without compliance with procedural requirements, or on other points of law. But there is no judicial review of facts in rule-making and the courts on the Moon thus perform substantially the same function in reviewing agency rules that they do in reviewing acts of Congress.

The adjudicative functions of the agency are handled about as the courts would deal with them in the absence of the agency, taking account, however, of the specialized functions of the agency and the need for sound judgment in technical matters. They have a word for this—expertise. When it is convenient to do so, they entrust certain of these adjudicative functions to the courts. And where specialization seems particularly desirable, they establish courts of special jurisdiction. These administrative courts hear and decide administrative law cases at the trial level. We found that their Tax Court is a part of the judiciary rather than an independent tribunal in the executive branch of the Government. In most cases tried in the administrative courts the agency initiates and prosecutes the action and the court receives and considers the evidence and decides the case just as the ordinary courts decide other cases in which the government is one of the parties. If the agency is dissatisfied with the policy result of an administrative court decision it soon rectifies it, as to future cases, by adopting a new rule consistent with its delegated powers. So even though the courts have an important function in adjudicating cases, the agency, through its powers of investigation, initiating complaints, prosecuting actions, and enacting rules, retains the ultimate control over administrative policy.

Where adjudicative functions are retained within the agency itself, an ingenious method is used to maintain the separation of powers which seems to underlie their whole system of government. They accomplish this by assigning to certain commissioners within the agency the sole function of deciding cases. In the performance of adjudicative functions, these commissioners have considerable independence. They are not subject to the control or direction of the investigating and prosecuting personnel of the agency. They may not receive evidence or hear arguments from any person or party except upon notice and opportunity for all parties to be present. And

they are required to base each decision upon the record adduced before them.

After the hearing is concluded, the commissioners find the facts, state conclusions of law, and render what is called the initial decision. This decision becomes final unless reviewed by the agency on appeal to, or by direction of, the agency. Since the commissioners have heard all the evidence, have observed the demeanor of the witnesses, and are specialists in adjudication, their findings of evidentiary fact are binding upon the agency unless, of course, they are contrary to the weight of the evidence.

After the agency considers the briefs and hears arguments, it renders its final decision which may affirm, set aside, or modify the order of the commissioner. But in the performance of this decisional function the agency, too, is considered as engaged in adjudication, is restricted to the record on review, and may not consult any person or party other than personal assistants and employees who have not participated in the same or in currently factually related cases. "In other words," we said, "your agency is something like the House of Lords. At one time it acts in a legislative capacity, in other cases it may act in a judicial capacity; but it keeps these two functions separated." And PAPA said, "administratively speaking, that is substantially correct."

Now, at this juncture it should be noted that what we have been describing is the formal adjudicative process of the administrative law system on the Moon. They use this process whenever, either under the constitution or by statute, a hearing is required in an adjudicative proceeding. There are a great many adjudicative matters for which hearings are not so prescribed, such as proprietary functions, public contracts, and determinations based upon inspections, tests, or examinations. In those cases the decision of the subordinate officer is usually subject to intra-agency review by a board or superior officer. No formal record is made of the informal adjudications, and appeals which are taken to the courts are necessarily based upon the record adduced de novo in the reviewing court. But the same limitations apply on scope of review as in formal adjudication.

Judicial review of formal agency adjudications follows closely the appellate review of decisions of trial courts. In effect, the Moonmen consider the final decision of the agency as the equivalent of the final judgment of a trial court. Decisions may be set aside for error of law, or for abuse of discretion, or for clearly erroneous findings of fact.

Well, that gave us a pretty clear picture of the administrative law system on the Moon, and we asked PAPA how it works in practice. He obliged by telling us about a case which had just been decided by their high court.

> It seems that the agency had duly promulgated, after notice, a rule requiring all dispensers of Moonjuice to be licensed. One of the agency investigators discovered a Moonman by the name of Snuffy Smith who was selling Moonjuice without a license. An action was brought against Smith to assess a civil penalty of fifteen lashes and ten days in the stock for violating this agency rule. The case was heard before an independent trial commissioner who received the evidence, found against Smith, and declared the penalty. On appeal, the agency departed from its usual custom, received additional evidence, and confirmed the ruling. When the case finally reached the high court the evidence was almost gone, but there was enough left to be reviewed and the court retired to consider its opinion. When the court rendered its judgment it reversed the agency and ordered judgment for Smith on the ground that Smith could not have been guilty of selling Moonjuice without a license since the product he was selling was not Moonjuice at all, but Moonshine.

While the report goes on to describe other fascinating aspects of life on the Moon, its usefulness to students of administrative law terminates with the Snuffy Smith case—in fact, it probably should have terminated just before the Smith case. If the Moonmen—possessed of quasi-celestial intelligence—could do no better in the practical application of their administrative system than in Snuffy's case—simple and logical as that system may seem in form—we need not engage in too much self-censure over the lack of progress we simple Earthlings have made since someone first recognized that administrative law was assuming a vital role in modern government.

Actually, we have had the administrative process for a very long time. Sir William Holdsworth wrote that:

> If a lawyer, a statesman, or a political philosopher of the 18th century had been asked what was, in his opinion, the most distinctive feature of the British constitution, he would have replied that its most distinctive feature was the separation of powers of the different organs of the government.

Yet 18th century England had its boards and bureaus administering the business of government in much the same way that agencies of government function today.

Somehow, we seemed to awaken to the fact of administrative law a long time after it came into existence. It has only been in this century that the administrative process has received extensive, critical examination and that administrative law has acquired a subject status in our law schools.

The American Bar Association first took serious note of this area of the law with the creation in May 1933 of a Special Committee on Practice of Administrative Law. In 1945, this committee became the present Section of Administrative Law of the American Bar Association.

The committee undertook a study of the administrative process. It reported that the judicial functions of federal agencies could be separated from their legislative and executive functions only by creating an administrative court with appropriate branches and divisions. The 1936 report of the committee contained an extensive argument in favor of such a court, and the Association approved that recommendation in principle.

Following the disclosure of inadequacies in publication of administrative orders in *Panama Refining Co. v. Ryan*,[1] the federal government began to take positive interest in the subject. In 1939, President Roosevelt requested the Attorney General of the United States to appoint a committee to investigate the "need for procedural reform in the field of administrative law." This committee was duly appointed, and on January 24, 1941, submitted its report to the President, including the draft of a proposed bill on federal administrative procedure. Meanwhile, similar legislation known as the Logan-Walter Bill had passed both houses of Congress only to be vetoed by the President, pending the report of the Attorney General's committee.

In 1946, Congress passed and the President signed the Administrative Procedure Act. This legislation was premised on the Logan-Walter Bill and the majority and minority reports of the Attorney General's committee. It was the first general statement of legal principles applicable to the federal administrative agencies.

When the Second Hoover Commission began its study of the Executive Branch of the Government in 1953, a special Task Force was created on Legal Services and Procedure. Unlike the Attorney General's committee, this Task Force was not limited to administrative procedure but undertook a broad inquiry into the administration of legal affairs in the executive branch, including studies of personnel, organization, representation, jurisdiction, due process, efficiency, and economy. Administrative procedure was but one of many subjects examined by the Task Force.

The report of the Task Force contained numerous proposals for revision of the Administrative Procedure Act and called for enactment of a Code of Administrative Procedure which was to have been more comprehensive than the present act. This report, together with draft legislation, was duly submitted by the Task Force to the Commission, and upon that report the Commission then formulated its recommendations for submission to the Congress on April 11, 1955.

The American Bar Association took note of the several recommendations of the Hoover Commission in the area of legal services and procedure and created a Special Committee of the Association on Legal Services and Procedure. All sections and committees of the Association having a substantial interest in legal services and procedure of the federal government were represented on this committee.

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[1] 293 U.S. 388 (1935).

Several sub-committees of the Special Committee were appointed to work on various aspects of the subject. The Section on Administrative Law was assigned the task of preparing a first draft of a revision of the Administrative Procedure Act. For this purpose, a special drafting committee was appointed, which reported to the Council, which reported to the Section, which reported to the Advisory Committee, which submitted a final revised draft to the Special Committee. Finally, the Special Committee submitted its draft to interested professional groups and organizations and in due course published what is called the April 1957 Final Draft of a Code of Federal Administrative Procedure of the Special Committee on Legal Services and Procedure of the American Bar Association.

The description of the administrative law system on the Moon outlines in a very general way the principal provisions of the proposed code. A major objective of the code is to simplify the Administrative Procedure Act and to make it a more acceptable statement of congressional policy governing federal administrative procedure. It should be remembered that most of the independent regulatory bodies have detailed procedure and practice requirements in the legislation governing their own work. Reasonable procedural uniformity is a desirable goal, but some differences in procedure are essential if account is to be taken of varying agency and departmental activities and responsibilities. Any general legislation, such as the Administrative Procedure Act, must be sufficiently flexible to enable departments and agencies of the federal government to perform their functions in an efficient and effective manner. The need for prompt and decisive action must not be unduly impeded by the desire for procedural uniformity in the administrative activities of government.

The proposed code liberalizes the Administrative Procedure Act in several respects. As to public information, it provides exemptions for subject matter required to be kept secret in the protection of national security, submitted in confidence pursuant to statute or agency rule or direction, the disclosure of which would be a clearly unwarranted invasion of personal privacy, or the publication of which is exempt by statute. Provision is made for alternative methods of publication where such alternatives would achieve economy and expedite dissemination of the information. As to rule making, it provides exemptions from notice and public participation in rule making required to be kept secret in the protection of national security, or relating to public property, loans, grants, benefits, contracts, or the internal management or personnel of the agency. As to adjudication, it provides informal methods of procedure for proprietary functions, public contracts, and determinations based upon inspections, tests, or examinations. Provision is made for the issuance of temporary and emergency rules without compliance with formal rule making procedures and for the issuance of emergency orders without

compliance with formal adjudicative procedures.

The proposed code contains some features which would extend the applicability of the Administrative Procedure Act. The code would redefine rule-making to mean statements of general applicability and future effect implementing, interpreting, or declaring law or policy, thereby in effect transferring statements of particular applicability, such as rate orders, to the category of adjudication. The code would establish the initial decision as the sole method of hearing formal adjudicative cases by hearing commissioners and would restrict agencies in overturning such decisions on the evidentiary facts to cases in which such facts were contrary to the weight of the evidence. Upon judicial review, agency decisions in matters of adjudication could be set aside under the code where based upon findings of fact that are clearly erroneous on the whole record. Provision is made for court actions to enjoin agency proceedings clearly in excess of constitutional or statutory authority.

The Committee on Government Operations of the House of Representatives is now conducting a survey and study of federal administrative organizations, procedure, and practice. As a part of this study the committee prepared a comprehensive questionnaire which it submitted to the several departments and agencies of the executive branch of the Government engaged in administrative functions. The responses to this questionnaire were published in December 1957 for ten departments and thirty-one independent agencies. Analysis of these responses shows considerable variations in administrative practice and procedure among these departments and agencies. This survey by the Committee on Government Operations will enable the Committee and the Congress to evaluate the various matters proposed for inclusion in the Code of Administrative Procedure.

Administrative procedure is no more static than judicial procedure. The methods by which quasi-legislative and quasi-judicial functions of government are performed will constantly be changed and improved in the light of experience. But the tempo of change will not necessarily be the same for all departments and agencies. Some will find it possible and convenient to develop formal procedures to a very high degree; others may find the adoption of such procedures a serious obstacle to the performance of tasks of great urgency and importance. A code of administrative procedure can do no more than establish minimum standards of administrative practice and procedure. It should provide procedural guideposts for departments and agencies. But it should not be expected to replace the more definite and comprehensive standards of practice and procedure governing each of the several departments and agencies of the federal government charged with the performance of administrative functions vital to the security and well-being of the American people.